

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PETER and SUSANNA ANTIPAS	:	CIVIL ACTION
	:	No. 98-1145
v.	:	
	:	
2102, INC., A Pennsylvania Corporation	:	

O'Neill, J.	June , 1998
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MEMORANDUM

On March 27, 1998, this court entered judgment by confession against defendant 2102, Inc. and in favor of plaintiffs Peter and Susanna Antipas for \$25,201.70 and possession of property at 2102 Market Street, Philadelphia. Defendant now moves pursuant to Federal Rule of Civil Procedure 60(b) to "Strike or Open the Judgment" and to stay execution. For the reasons set forth below, the judgment will be vacated.

I.

On May 27, 1992, defendant (lessee) entered into a ten-year lease with Nick Yiambilis (lessor) for the "ground floor, containing approx. 3000 square ft in the two story bldg numbered as 2102 Market St." (Pls.' Complaint for Confession of Judgment, Ex. A.) The lease gave defendant a right of first refusal to purchase the building should the lessor desire to sell it.

Nick Yiambilis died in the fall of 1992. In June 1996, the Executrix of his Estate signed an agreement (apparently undated) to sell the property at 2102 Market Street to defendant for

\$300,000. Subsequently, the Executrix resigned and George Scott Stewart, III was appointed Administrator of the Estate. Although defendant notified Stewart of the outstanding sale agreement and its right of first refusal, the property was sold to plaintiffs on November 13, 1997 for \$270,000.

In December 1997, defendant brought an equity action in the Philadelphia Court of Common Pleas against plaintiffs and Stewart seeking to enforce its right to purchase the property. In February 1998, plaintiffs, who are residents of New Jersey, instituted a diversity action in this court, No. 98-787, against defendant and otherd involved in the disputed property sale. In that action, plaintiffs seek to quiet title to the property and allege various state law claims for, inter alia, breach of contract, interference with contract, and legal malpractice.

On March 4, 1998, plaintiffs brought the instant diversity action seeking to confess judgment against defendant for \$23,351.17 and possession of the leased property.¹ Plaintiffs alleged that defendant had failed to pay rent beginning December 1, 1997, failed to pay for plumbing repairs that were its responsibility, failed to correct municipal code violations resulting

¹ The lease authorizes confession of judgment as follows:

[¶ 16] If rent and/or any charges hereby reserved as rent shall remain unpaid on any day when the same ought to be paid, Lessee hereby empowers any Prothonotary, Clerk of Court or attorney of any Court of Record to appear for Lessee in any and all actions which my be brought for rent and/or the charges, payments, costs and expenses reserved as rent, or agreed to be paid by the Lessee . . .and in said suits or . . . actions to confess judgment against Lessee for all or any part of the rent specified in this lease and then unpaid . . .

[¶ 17] When this lease shall be determined by condition broken . . . it shall be lawful for any attorney as attorney for Lessee to file an agreement for entering in any competent Court an amicable action and judgment in ejectment against Lessee and all persons claiming under Lessee for the recovery by Lessor of possession of the herein demised premises, for which this lease shall be his sufficient warrant . . .

from the plumbing problem, and failed to pay late charges for the delinquent rent. (Compl. ¶ 8.)

On March 18, plaintiffs filed an amended proposed judgment order for \$25,201.70 in damages.²

On March 27, 1998, judgment by confession was entered in favor of plaintiffs for this sum and possession of the property.

Defendant subsequently filed this timely motion to strike or open the judgment.

Defendant contends that (1) plaintiffs' authority to exercise the warrant to confess judgment in the lease is not supported by the record and (2) it was not in default of the lease.

II.

Judgment by confession is a product of state law, having no analog in the federal rules. In Pennsylvania, the state's Rules of Civil Procedure prescribe the procedures and filing prerequisites for obtaining confessed judgments and, in effect, affirm the validity of contractual waivers of prejudgment procedures in Pennsylvania. Pa. R. Civ. Proc. 2951-59, 2970-72; see AmQuip Corp. v. Pearson, 101 F.R.D. 332, 334-336 (E.D. Pa. 1984).

Pennsylvania's rules of procedure also prescribe how a confessed judgment may be successfully attacked. By motion to open the judgment, a defendant may assert defenses going to the merits of the alleged default. If the defendant presents evidence in support of a meritorious defense sufficient to create a triable issue of fact, the judgment will be opened. Pa. R. Civ. P. 2959(b), (e); see also, e.g., Resolution Trust Corp. v. Copley Qu-Wayne Assocs., 683 A.2d 269

² This sum represents \$14,241.64 for unpaid rent from December 1997 to March 1998 (at \$3,560.41 per month); \$8,669 for plumbing repairs; and \$2,440.06 for late charges, attorney fees, and costs as authorized by the lease. Other than subtracting a claim for \$150 in court costs, the amended proposed order simply corrected an arithmetic order in the original.

(Pa. 1996); J.F. Realty Co. v. Yerkes, 398 A.2d 215 (Pa. Super. Ct. 1979). Execution on the judgment will then be stayed until the court can resolve the disputed claims, but the judgment remains in effect as a judicial lien. Id. at 2959(f); Copley Qu-Wayne Assocs., 683 A.2d at 273.

A motion to strike, on the other hand, tests the sufficiency of the record upon which confessed judgment was entered. The court takes all the plaintiff's allegations as true and will grant the motion only to remedy a "fatal defect or irregularity appear[ing] on the face of the record or judgment."³ Manor Bldg. Corp. v. Manor Complex Assocs., 645 A.2d 843, 845 n. 2 (Pa. Super. Ct. 1994); see also, e.g., Yerkes, 398 A.2d at 217. A judgment may be struck, for example, if it is for "a grossly excessive amount or includes recovery for items that were not permitted in the contract authorizing confession of judgment." Yerkes, 398 A.2d at 217. An order striking a judgment nullifies it, as if the judgment had never been entered. Copley Qu-Wayne Assocs., 683 A.2d at 273.

Under Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938), a diversity action involving only state claims is governed by federal procedure and state substantive law. Procedurally, therefore, a motion to strike or open a confessed judgment is considered pursuant to Federal Rule

³ While recognized by Rule 2959, a motion to strike is a product of the common law rather than rules of procedure. Copley Qu-Wayne Assocs., 683 A.2d at 273.

of Civil Procedure 60(b).⁴ In all substantive respects, however, the motion is considered pursuant to Pennsylvania law. “Federal diversity jurisdiction provides an alternative forum for the adjudication of state-created rights, but does it does not carry with it generation of rules of substantive law.” Gasperini v. Center for Humanities, Inc., 116 S.Ct. 2211 (U.S. 1996). State law -- including the substantive aspects of the Pennsylvania Rules of Civil Procedure -- thus governs what types of defenses may be asserted against a confessed judgment, the legal merits of those defenses, and the substantive standard defendant must meet in support of its defenses to

⁴ But see RTC Mortgage Trust 1994-N2 v. Verker, 1996 WL 660961 (E.D. Pa. 1996) and Allied Bldg. Prods. Corp. v. Delco Roofing Co., 951 F. Supp. 1183, 1187 n. 1 (E.D. Pa. 1996), in which the courts apparently applied even purely procedural aspects of the Pennsylvania Rules of Civil Procedure in considering motions to open or strike confessed judgments. In Allied Bldg. Prods. Corp., the court applied Pennsylvania procedure on the basis of Fed. R. Civ. P. 69(a), which provides that “[t]he procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held.” Id. at 1187 n. 1. In my view, Rule 69 by its terms does not address procedure with regards to a motion seeking relief from a judgment; that is the express domain of Rule 60(b).

In RTC Mortgage Trust 1994-N2 v. Verker, 1996 WL 660961 (E.D. Pa. 1996), the court construed a recent Third Circuit decision, Resolution Trust Corp. v. W.W. Dev. & Management, Inc., 73 F.3d 1298 (3d Cir. 1996), to require that federal courts in this district apply Pennsylvania procedural rules when considering a motion to open or strike a confessed judgment. See id. at *2. I disagree. At issue in W.W. Dev. & Management, Inc. was whether appellant’s petition to open, originally filed in state court in response to a confessed judgment entered against it by a bank just before the bank was taken over by the RTC, was subject to certain jurisdictional limitations imposed by the Financial Institutions Reform, Recover, and Enforcement Act of 1989 (FIRREA). Id. at 1308. If the petition was considered part of the confession of judgment proceedings and therefore part of a pre-receivership action, it would not be subject to FIRREA. If the petition was a separate action, on the other hand, FIRREA would apply because the petition was filed after the receivership. The court determined that under the Pennsylvania rules a petition to strike or open was part of the same proceeding as the confession of judgment and that the petition was therefore part of a pre-receivership action and survived FIRREA. Id. In sum, the court examined the Pennsylvania rules of procedure only to ascertain whether a petition to strike or open a confessed judgment was considered part of the same proceeding as the confession of judgment or, rather, constituted a separate action. The court did not purport to address whether Pennsylvania procedure should be applied by a federal court considering a motion for relief from a confessed judgment and in my view provides no support for doing so.

prevail on the motion.⁵

III.

Defendant first asserts that the judgment is formally defective and should be struck because the record on which it was granted does not contain a written assignment of the lease to plaintiffs. This argument is meritless. Section 20 of the lease expressly gives plaintiffs, as the lessor's assignees by operation of law, the right to confess judgment against defendant regardless

⁵ Some courts in this district have applied the federal common law substantive standard for setting aside a verdict under Rule 60(b) as enunciated in, among other cases, Central W. Rental Co. v. Horizon Leasing, 967 F.2d 832, 836 (3d Cir. 1992) and Resolution Trust Corp. v. Forest Grove, Inc., 33 F.3d 284, 288 (3d Cir. 1994). See, e.g., Carriage Properties, Inc. v. Arrington, 152 F.R.D. 488 (E.D. Pa. 1996); cf. AmQuip Corp. v. Pearson, 101 F.R.D. 332, 334-336 (E.D. Pa. 1984). This standard, borrowed from the "analogous context" of a motion to set aside a default judgment, requires that a court consider whether setting aside the judgment will prejudice the plaintiff, whether the defendant was culpable for the default, and (most importantly) "whether the defendant has alleged facts which, if established at trial, would constitute a meritorious defense to the cause of action." Central W. Rental Co., 967 F.2d at 836.

In Central W. Rental Co. and similar cases, however, the court of appeals applied a federal substantive standard because the cases were deemed to arise under federal law. See 967 F.2d at 836-37; see also Forest Grove, Inc., 33 F.3d at 289. Such cases are therefore inapposite to actions arising wholly under state law. Moreover, Central W. Rental Co. is almost certainly no longer good law in the wake of recent Supreme Court decisions reiterating that there "[t]here is no federal general common law," Atherton v. FDIC Corp., 117 S.Ct. 666, 670 (1997) (quoting Erie R. Co. v. Tompkins, 304 U.S. at 78), and that, even in cases arising under federal law, courts should resort to federal common law only if there is a "significant conflict" between some federal policy or interest and the state rule. Id.; see also Forest Grove, Inc., 33 F.3d at 289. Rule 60(b) does not itself prescribe a substantive standard for setting aside a verdict and therefore in no way conflicts with the standards set forth by the Pennsylvania rules. Nor is there any other reason why different rules of decision should be applied to this case merely because plaintiff chose a federal rather than a state forum. See generally Gasparini, 116 S. Ct. 2219-2221.

In many confessed judgment cases, it may not matter in the end whether the state standards or the federal common law standard is applied. See, e.g., S.C. Food Services, 1996 WL 515501, at *3 (judgment would be opened whether federal or state standard applied); cf. Forest Grove, Inc., 33 F.3d at 288 (similar). Nonetheless, applying the federal substantive standard is an incorrect and unnecessarily awkward way to give effect to state law defenses and standards. In some cases, moreover, applying the federal standard might result in exactly the sort of forum shopping by plaintiffs and disparate treatment of defendants that Erie was intended to end. Cf. AmQuip, 101 F.R.D. at 336-37 (implying that attacks on confessed judgments for merely formal defects, as authorized under state law via motion to strike, might not be cognizable under the federal substantive standard for Rule 60(b) relief).

of the existence of a written assignment,⁶ and this right is enforceable under Pennsylvania law.

See Weitzman v. Ulan, 450 A.2d 173, 177 (Pa. Super. 1982) (construing same lease provision in nearly identical circumstances).⁷

B.

Defendant next argues that the judgment should be opened because, contrary to plaintiffs' allegations, it was not in fact in default of the lease. Defendant asserts that it has paid all rent due, that it was not responsible for the repairs to the plumbing, and that even if it were potentially in default of the lease it was not given the notice required to put it in actual default.

Defendant avers that it did pay the December 1997 to March 1998 rent and offers copies of canceled checks made out to "Nick Yiambilis Estate," signed over to plaintiffs by the Administrator, Stewart, and endorsed and deposited by Peter Antipas on or about March 12, 1998. (Def. Ex. 2-5.) While three of these checks are apparent underpayments (failing to include

⁶ Section 20 provides:

The right to enter judgment against Lessee and to enforce all of the other provisions of this lease hereinabove provided for may, at the option of any assignee of this lease, be exercised by an assignee of the Lessor's right, title and interest in this lease in his, her or their own name, notwithstanding the fact that any or all assignments of the said right, title and interest may not be executed and/or witnessed in accordance with the Act of Assembly of May 28, 1715, 1 Sm. L. 90, and all supplements and amendments thereto that have been or may hereafter be passed and Lessee hereby expressly waives the requirements of said Act of assembly and any and all laws regulating the manner and/or form in which such assignments shall be executed and witnessed.

⁷ Moreover, under the Pennsylvania rules an "assignee or other transferee" of the original holder of an instrument authorizing confession of judgment may also confess judgment thereunder "unless expressly forbidden in the instrument." Pa. R. Civ. P. 2951. The assignee must include in the complaint for confession of judgment a "statement of any assignment of the instrument," but neither a written assignment nor proof of transfer of title is required. Pa. R. Civ. P. 2952(a)(4); Manor Bldg. Corp., 645 A.2d at 848; cf. Copley Qu-Wayne Assocs., 683 A.2d at 276 (holding that "failure to set forth express authority [to confess judgment] is [not] a fatal defect or irregularity on the original record . . . the issue of express authority is a defense which can be established through a petition to open").

a rental increase from \$3,327.50 to \$3,560.41 required under the lease beginning June 1997), plaintiffs confessed judgment not for the amount of underpayment but for the entire rental amount. In addition, plaintiffs concede that they accepted payment (albeit via a check written out to the Yiambilis Estate and signed over to plaintiffs by Stewart) for all late charges and delinquent rents on March 13, 1998 after allegedly serving defendant notice of default.⁸ (Pls.' Reply at 10-11.) The record thus shows that plaintiffs were not entitled to approximately \$16,500 of the \$25,201.70 they obtained by the confessed judgment. For this reason alone the judgment for money damages must be set aside.

Defendant next contends that under the terms of the lease it was not responsible for repairs to the plumbing in the basement, where the plumbing problem was, but only in the demised premises --i.e., the ground floor of the property.⁹ Upon review of the lease provisions cited by the parties (§§ 8(b), 40, 52), I conclude that defendant presents a potentially meritorious defense as to whether defendant or the lessors were responsible for the disputed repairs. The

⁸ Defendant also offers evidence from which it might be inferred that the delay between when Stewart received the rental checks for December, January, and February and when Antipas apparently signed and deposited the checks in March was the result of an amicable agreement between Antipas and Stewart. (Def. Ex. 9.) Moreover, there is no evidence in the present record that upon taking title to the 2102 Market Street property plaintiffs made demand upon defendant to make payments directly to them.

⁹ A typewritten rider to the lease, which states that its provisions are to prevail over any conflicting provision in the printed form lease, provides in relevant part:

[¶ 40] Repairs and Replacements. Lessee acknowledges receiving [sic] the demised premises from the lessor in good condition. Structural repairs shall be made and paid for by lessor; otherwise, lessee agrees to maintain all other parts of the demised premises[:] electrical, heating, plumbing, air conditioning, and other systems in the demised premises, in the same good condition as when lessee received [sic] them at taking occupancy, and to this end, lessee shall pay all costs and expenses of repair, replacements, and maintenance for the same . . .

lease makes defendant responsible for repairs to plumbing in the “demised premises,” which are defined by the preamble to the lease as the “ground floor” of the two-story building, while the plumbing problem was in a small basement area below the ground floor. The parties dispute whether this area should nonetheless be considered part of the demised premises. I conclude that defendant has presented a factual dispute as to whether the plumbing repairs were its responsibility.¹⁰

Finally, defendant contends that even if it were potentially in default for any of the reasons alleged by plaintiffs, it was not given the notice and ten-day grace period required to put it in actual default of the lease.¹¹ Plaintiffs counter that they did serve notice of default on March 9, 1998 and refer the court to an exhibit attached to their Answer. This exhibit, however, is merely a photocopy of two return receipts for certified mail and does not include any letter or other document showing what claimed defaults, if any, were brought to defendant’s attention. (Pls.’ Answer, Ex. B.) More to the point, as already noted plaintiffs concede that they accepted payment on or about March 11-13 for all late charges and delinquent rent. As the record now stands, therefore, it appears that defendant cured at least these claimed defaults within the grace

¹⁰ Defendant also avers that it never received any violation notices from the City of Philadelphia and plaintiffs have thus far produced no evidence to the contrary.

¹¹ Section 54 of the lease rider provides:

Grace Period. Lessee shall not be considered to be in default under this lease unless lessee fails to correct any claimed default within ten (10) days after mailing by lessor to lessee of written notice of such claimed default by certified mail, return receipt requested. If such claimed default is other than for the payment of money, and is such as cannot be reasonably cured or corrected within ten (10) days, lessee shall immediately upon receipt of such notice, commence to correct the claimed default and proceed without interruption to cure the same.

period and could not have been considered in default for unpaid rent.

I conclude that defendant has shown that (1) plaintiffs were not entitled to at least a substantial portion of the money damages for which they obtained confessed judgment and (2) there are factual disputes as to whether defendant was in default of the lease.¹²

¹² I find incredible plaintiffs' apparent argument that the mere fact that defendant's checks were written out to the Yiambilis Estate rather than to plaintiffs could of itself put defendant in default, much less justify a judgment for money damages for rent that plaintiffs have in fact already received. **UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

PETER and SUSANNA ANTIPAS	:	CIVIL
ACTION	:	
	:	No. 98-1145
v.	:	
	:	
2102, INC., A Pennsylvania Corporation	:	

ORDER

AND NOW this day of June, 1998, upon consideration of defendant's motion to Strike or Open the Judgment for Confession of Money Damages and Possession of Property and the parties' filings related thereto, it is hereby ORDERED that:

(1) the judgment entered on March 27, 1998 in favor of plaintiffs and against defendant for \$25,201.70 and possession of real property at 2102 Market Street, Philadelphia is VACATED; and

C.

Insofar as they have merit, defendant's attacks on the confessed judgment are based on matters outside the record on which judgment was entered and, under Pennsylvania law, would ordinarily entitle defendant only to having the judgment opened; the judicial lien effected by the judgment would remain. Assuming that the state's distinctions between when a judgment should be struck and when it should be opened constitute substantive rules that should be given effect by this court, I nonetheless conclude that the proper relief here is to vacate (strike) the judgment.

In their proposed order for Judgment for Money Damages filed March 18, 1998, plaintiffs represented that defendant owed them four months rent and associated late charges and implicitly reaffirmed the allegations of their complaint to the same effect. These representations have proved at a minimum misleading. Faced with similar facts, I believe the Pennsylvania courts would strike the judgment. Ordering such relief is also consistent with this court's equitable powers pursuant to Federal Rule 60(b).

Accordingly, the judgment entered by confession on March 27, 1998 will be vacated. Defendant's proposed answer is deemed filed and the parties shall proceed as in an ordinary case. See AmQuip Corp., 101 F.R.D. at 339. The court will immediately entertain motions on how it should proceed in light of the previously-pending state court action.

(2) defendant's proposed Answer to plaintiffs' Complaint is deemed filed.

THOMAS N. O'NEILL, JR. J.